

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANDI KRAJA,

Plaintiff,

v.

BELLAGIO, LLC, *et al.*,

Defendants.

Case No. 2:15-cv-01983-APG-NJK

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

(ECF No. 17)

Plaintiff Andi Kraja worked as a food server at Circo restaurant in the Bellagio Hotel & Casino. He alleges that he was subjected to years of harassment and eventually demoted because of his ethnicity. He brings claims for hostile-work environment and retaliation under Title VII, discrimination and retaliation under § 1981, and state-law claims for intentional infliction of emotional distress and intentional interference with prospective economic advantage.

Defendants move to dismiss on several bases. I grant their motion in part and deny it in part. I dismiss Kraja's complaint for lack of subject-matter jurisdiction with respect to all Title VII claims except his hostile-work environment claim and his claim that defendants intentionally failed him on a work-performance test because of his Albanian descent. I also dismiss Kraja's § 1981 claims with prejudice because he withdrew them. *See* ECF No. 17 at 2. Finally, I dismiss both of Kraja's state-law claims with leave to amend because portions of both claims are either untimely or implausible.

I. BACKGROUND

Kraja is a white Caucasian male of Albanian descent who began working as a food server at Circo restaurant in the Bellagio Hotel & Casino on January 21, 2011. ECF No. 11 at ¶¶ 13, 14. He alleges his manager, defendant Vincent Rotolo, repeatedly harassed him because of his heritage, saying "Albanians are lazy, conniving, and thieves." *Id.* at ¶ 17. Kraja reported

1 Rotolo's remarks to the restaurant's general manager, Fabian Forlini. *Id.* But Forlini "shrugged
2 [the complaints] off," because "Rotolo is from New York and he has the New Yorker attitude."
3 *Id.*

4 Kraja alleges that the harassment escalated when Rotolo learned about Kraja's
5 complaints. *Id.* at ¶ 19. On November 19, 2012, Kraja was serving a large party of guests and
6 discovered that items had been left off the check that only Rotolo could add. *Id.* Kraja asked
7 Rotolo to add the items but Rotolo avoided Kraja. *Id.* The guests grew impatient and Kraja
8 insisted that Rotolo assist him. *Id.* Rather than comply with Kraja's request, Rotolo shouted in
9 response, "You fucking Albanians!" *Id.*

10 The following day, Kraja asked Forlini to document his complaints about Rotolo and
11 "follow up with appropriate action." *Id.* at ¶ 21. If Forlini refused, Kraja said he would seek help
12 from human resources. *Id.* Forlini told Kraja not to contact human resources and that he would
13 take care of the matter himself. *Id.* But on December 2, 2012, Rotolo started yelling at Kraja
14 while he was serving guests in a private dining area. *Id.* Rotolo came within inches of Kraja's
15 face, shoved him, forced him into the corner of a small room, and blocked the exit with his body.
16 *Id.* When Kraja finally escaped, he asked another manager, Antonio Callea, to call security. *Id.*
17 But Callea refused to call until the end of Kraja's shift. *Id.*

18 When Forlini learned about the incident the next day, he appeared to be upset but he did
19 nothing to stop the harassment. *Id.* at ¶ 22. Instead, Kraja alleges that Forlini joined in the
20 harassment and intentionally gave Kraja short notice about upcoming shifts to increase the
21 likelihood that he would be late and could eventually be terminated. *Id.* at ¶ 23. Kraja also
22 alleges that Forlini intentionally offered shifts to more junior servers to prevent Kraja from
23 working. *Id.*

24 Kraja reported these issues to Jessica Harbaugh (the human resources representative),
25 Dominique Bertolone (the director of food and beverage), and Jose Alvarez (the culinary union
26 shop steward). *Id.* at ¶ 24. Harbaugh and Bertolone resolved the scheduling issues but did not
27 address the root of the problem, Rotolo's alleged racial discrimination. *Id.* at ¶ 25. As a result,
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1 Rotolo allegedly recruited Callea to join in the harassment. *Id.* at ¶ 26. Kraja alleges that Callea
2 intentionally over-seated Kraja's section to undermine Kraja's ability to serve his customers. *Id.*

3 At this point, Kraja began experiencing "severe depression." *Id.* at ¶ 27. He gained 63
4 pounds, became physically ill before reporting to work, and withdrew from his social life. *Id.* On
5 May 29, 2013, Kraja applied for a position at a restaurant in Caesars. *Id.* at ¶ 28. Management at
6 Caesars interviewed Kraja and informed him that he "would be a great addition." *Id.* But Kraja
7 was later told that "[a]fter speaking to your Manager Vincent Rotolo we won't be able to
8 continue with your application." *Id.*

9 On June 12, 2013, Rotolo instructed Kraja to complete tasks that were not part of his job
10 description, including cleaning crevices around the restaurant's doors with a sharp knife and
11 doing other servers' side work. *Id.* at ¶ 29. He also took Kraja into a refrigerator in the kitchen,
12 accused him of breaking it, and yelled, "What's wrong with the light?" *Id.*

13 Because Kraja's prior complaints to the human resources department did not stop the
14 harassment, Kraja contacted Randy Morton, Bellagio's Chief Operating Officer and President.
15 *Id.* at ¶ 31. On June 15, 2013, Kraja met with Morton, Bertolone, and Alvarez and described
16 how Rotolo, Forlini, and Callea harassed him. *Id.* at ¶ 32. Weeks passed with no investigation
17 and Rotolo, Forlini, and Callea continued to harass Kraja. *Id.* at ¶ 33.

18 Kraja submitted an online application to a transfer to Prime Steakhouse, another
19 restaurant at the Bellagio. *Id.* at ¶ 34. But when he contacted human resources to find out
20 whether he would be able to transfer, he was told that his application was not in the system and
21 only a manager could have removed it. *Id.* One of Kraja's former managers from a different
22 restaurant called Prime Steakhouse to recommend Kraja for the position. *Id.* But Kraja's
23 application was rejected and a server with less experience was hired. *Id.*

24 In November 2013, Daniela DeGrazia replaced Rotolo as one of Circo's assistant general
25 managers, but Callea continued to harass Kraja. *Id.* at ¶ 36. Kraja allegedly reported Callea to
26 DeGrazia many times but nothing was done. *Id.*

27 Kraja alleges that on January 6, 2014, he was falsely accused of threatening another
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1 employee and escorted from the restaurant by security. *Id.* at ¶ 37. Kraja contacted Bertolone
2 and Harbaugh, explained that he had been falsely accused, and was allowed to return to work
3 three days later. *Id.* He then filed a formal grievance with the Culinary Union along with union
4 shop steward Monique Smith. *Id.* at ¶ 38. Kraja was made a union steward to convey to Circo's
5 management that the harassment "would not be tolerated or swept under the proverbial rug." *Id.*
6 at ¶ 39.

7 On February 6, 2014, DeGrazia gave Kraja a "write-up" because guests had complained
8 about his service. *Id.* at ¶ 40. When Kraja asked DeGrazia about the incident, she informed him
9 that it had occurred on January 21 and that she wanted Kraja to return the customer's tip to them.
10 *Id.* Kraja immediately recalled the incident and informed DeGrazia that it was Callea's doing
11 and reminded DeGrazia that he had already spoken to her about Callea's actions. *Id.* DeGrazia
12 said that she remembered and would remove the "write-up" from his personnel file. *Id.* But the
13 write-up was never removed and Callea was not reprimanded. *Id.*

14 In June 2014, Kraja reported to work and saw a large sign reading "FAT ANDY" at
15 Server Station 5. *Id.* at ¶ 42. Kraja asked DeGrazia to remove the sign, but the sign was not
16 removed. *Id.* Kraja contacted Smith and Harbaugh again to discuss the harassment. *Id.*
17 DeGrazia was subsequently transferred to a different restaurant but the Fat Andy sign remained
18 posted until Circo closed on September 28, 2014. *Id.*

19 On July 25, 2014, Kraja told a hostess that one of his guests would like to move to a
20 different section in the restaurant. *Id.* at ¶ 44. In response, Kraja received another write-up for
21 "refusing service to the guest." *Id.*

22 A few months later, management announced that some of Circo's staff would be
23 transferring to a different restaurant and would be assessed before the transferred occurred. *Id.* at
24 ¶ 45. Kraja was given a manual to study and told that he and other servers would train at the
25 Culinary Training Academy for 6 to 8 weeks. *Id.* at ¶ 46. On February 2, 2015, Kraja took a
26 written test, which he passed, and completed an audition, which he failed. *Id.*

27 On February 27, 2015, Kraja discovered that he had not been offered a position with the
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1 new restaurant. *Id.* at ¶ 48. He became ill and presented at Summerlin Hospital Urgent Care,
 2 where he was diagnosed with severe anxiety attacks and prescribed medicine. *Id.* at ¶ 49.

3 On March 5, 2015, he filed another grievance with the culinary union. *Id.* at ¶ 50. A
 4 meeting was held but union representatives and Bellagio management refused to address Kraja's
 5 concerns regarding the years of harassment. *Id.* Kraja then met with the union director and the
 6 union attorney. *Id.* His complaints were not addressed and Kraja was eventually demoted to the
 7 Banquets C list, where shifts are not guaranteed. *Id.*

8 **II. ANALYSIS**

9 A properly pleaded complaint must provide a "short and plain statement of the claim
 10 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*,
 11 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands
 12 more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of
 13 action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual
 14 allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. To
 15 survive a motion to dismiss, a complaint must "contain [] enough facts to state a claim to relief
 16 that is plausible on its face." *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation
 17 omitted). I accept as true all well-pleaded facts and construe them in the light most favorable to
 18 the nonmoving party. *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013)
 19 (citations omitted).

20 **A. Administrative Exhaustion**

21 Before filing a Title VII claim, a plaintiff must exhaust his administrative remedies. *B.K.B.*
 22 *v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002), as amended (Feb. 20, 2002) (citing
 23 *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)). If a plaintiff does not file a
 24 timely administrative charge, or if his complaint alleges wrongdoing that falls outside of the
 25 charging document or the EEOC's investigation, then the plaintiff failed to exhaust his
 26 administrative remedies. *Id.* (discussing scope); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d
 27 1172, 1174 (9th Cir. 1999) (discussing timing).
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1 Defendants argue that Kraja failed to exhaust his administrative remedies because his
2 complaint alleges wrongdoing that was not administratively charged. Specifically, the
3 administrative charge alleges that six managers (excluding Rotolo, Forlini, and Callea) created a
4 hostile work environment and discriminated against Kraja between June 2014 and May 2015 by
5 denying him a transfer, issuing him written discipline, and failing him on the work performance
6 test. *See* ECF No. 17 at Ex. C. By contrast, the complaint names Rotolo as a defendant and
7 alleges that Rotolo, Forlini, Callea, and other managers discriminated against between 2011 and
8 2015 for additional acts not identified in the charge. *See generally* ECF No. 11. Kraja responds
9 that he properly exhausted his administrative remedies because each discrete act was part of a
10 continuing violation and the uncharged acts are “reasonably related” to the acts that were timely
11 charged.

12 Kraja’s argument intertwines two distinct legal concepts. The first is the continuing-
13 violations doctrine, which the Ninth Circuit adopted in *Williams v. Owens-Illinois, Inc.*, 665 F.2d
14 918 (1982). In *Williams*, twelve named plaintiffs alleged that their employer discriminated
15 against current and former black and female employees by implementing a policy that based job
16 assignments, transfers, and promotions on race and sex. *Id.* at 922. In deciding whether the
17 named plaintiffs had timely exhausted the class plaintiffs’ administrative remedies, the court
18 stated that “a systematic policy of discrimination is actionable even if some or all of the events
19 evidencing its inception occurred prior to the limitations period.” *Id.* at 924 (citation omitted).¹

20 The second concept Kraja relies on is known as the “like or reasonably related” standard,
21 which courts in the Ninth Circuit apply to determine if a plaintiff exhausted remedies for
22 allegations that were not contained in the administrative charge. *See B.K.B. v. Maui Police Dep’t*,
23 276 F.3d 1091, 1100 (9th Cir. 2002). In *B.K.B.*, a white female police officer filed an
24 administrative charge that alleged race, sex, national origin discrimination, and harassment “of a
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26 ¹ In *Green v. Los Angeles County*, the Ninth Circuit elaborated on the continuing-violations
27 doctrine and determined that “[a] continuing violation may . . . be established not only by demonstrating a
28 company-wide policy or practice, but also by demonstrating a series of related acts against a single
individual.” 883 F.2d 1472, 1480 (9th Cir. 1989).

1 verbal nature” and “further harassment.” *Id.* at 1100. But after the administrative agency issued
2 a right-to-sue letter, the police officer commenced an action alleging sexual harassment. *Id.* at
3 1096. In deciding whether sex discrimination and “further harassment” are “like or reasonably
4 related” to a claim for sexual harassment, the Ninth Circuit laid out the following framework:

5 In determining whether a plaintiff has exhausted allegations that she did not
6 specify in her administrative charge, it is appropriate to consider such factors as
7 the alleged basis of the discrimination, dates of discriminatory acts specified
8 within the charge, perpetrators of discrimination named in the charge, and any
9 locations at which discrimination is alleged to have occurred. In addition, the
court should consider plaintiff’s civil claims to be reasonably related to
allegations in the charge to the extent that those claims are consistent with the
plaintiff’s original theory of the case.

10 *Id.* at 1100.

11 Kraja reads *Williams* with *B.K.B.* to stand for the proposition that the narrow class of
12 discriminatory acts listed in his administrative charge exhausted his administrative remedies for
13 all of the discriminatory acts contained in the complaint, regardless of when they occurred. But
14 the Supreme Court’s decision in *National Railroad Passenger Corporation v. Morgan* requires a
15 different result.

16 In *Morgan*, an Amtrak employee filed an administrative charge alleging that he was
17 “consistently harassed and disciplined more harshly than other employees on account of his race.”
18 536 U.S. 101, 105 (2002). He filed claims for discrimination, retaliation, and hostile-work
19 environment. *Id.* at 104. Although some of the acts of discrimination and retaliation occurred
20 within 300 days of his administrative charge, many occurred before that. *Id.* at 106. The Ninth
21 Circuit allowed Morgan’s complaint to proceed on all acts of discrimination and retaliation
22 because the older acts were “sufficiently related” to the acts that were timely charged. *Id.* But the
23 Supreme Court reversed, holding that discrimination and retaliation claims are “different in kind”
24 from hostile-work environment claims and, therefore, subject to different standards when it
25 comes to timing and exhaustion. *Id.* at 115.

26 Because claims for retaliation and discrimination are based on “discrete acts”—like
27 “termination, failure to promote, denial of transfer, or refusal to hire”—they must be timely
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1 charged or are waived. *Id.* at 113–14. This is true “even when [those discrete acts] are related to
2 acts alleged in timely field charges.” *Id.* at 113. By contrast, claims for hostile-work environment
3 by “[t]heir very nature involve[] repeated conduct” that occurs over the course of time. *Id.* at 115.
4 A hostile-work environment “cannot be said to occur on any particular day. It occurs over a
5 series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment
6 may not be actionable on its own.” *Id.* at 115 (citation omitted). As a result, courts may consider
7 individual acts that “fall outside the statutory time period” when determining liability. *Id.* at 117.

8 Accordingly, the Supreme Court held that Morgan could bring claims for retaliation and
9 discrimination only for acts that occurred within 300 days of his administrative charge. “All prior
10 discrete discriminatory acts are untimely filed and no longer actionable.” *Id.* at 115. It also held
11 that Morgan could bring a claim for hostile-work environment based on incidents that occurred
12 before and during the 300-day period so long as some component acts of the hostile-work
13 environment were timely charged. *Id.* 120–21.

14 Kraja’s administrative charge requires a similar result. On May 29, 2015, he filed a
15 charge with the Nevada Equal Rights Commission, alleging that between June 2014 and May
16 2015, he was subjected to a hostile-work environment and discriminated and retaliated against
17 because defendants denied him a transfer, issued him written discipline, and failed him on a
18 work-performance test. *See* ECF No. 17 at Ex. C. But Kraja’s complaint here states claims of a
19 hostile-work environment² and discrete acts of discrimination and retaliation that appear to have
20 occurred as far back as 2011. *See* ECF No. 11 at ¶¶ 14, 17, 18.

21 Because Kraja filed his administrative charge on May 29, 2015, the only discriminatory
22 and retaliatory acts that are actionable are those contained in the administrative charge that
23 occurred 300 days before May 29, 2015 (i.e., after August 1, 2014). *See Morgan*, 536 U.S. at
24 114–15. Defendants argue that those acts are limited to Kraja’s allegations that defendants denied
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26 ² Although Kraja’s complaint does not contain a claim that is styled “hostile-work environment,”
27 both parties read the complaint as containing a hostile-work environment claim so I treat the complaint as
28 stating one. *See* ECF No. 11 at ¶ 15 (alleging that he was subjected to a hostile-work environment); ECF
No. 22 at 7 (stating that his complaint contains a hostile-work environment claim).

1 him a transfer, issued him written discipline, and failed him on a work-performance test. ECF No.
2 17 at 8. But the complaint alleges that the transfer denial and written discipline occurred
3 sometime in 2013, and that the defendants disciplined Kraja in writing on February 6, 2014 and
4 July 25, 2014. *See* ECF No. 11 at ¶¶ 34, 40–44. Accordingly, the only discriminatory act Kraja
5 timely exhausted is his allegation that defendants intentionally failed him on a work-performance
6 test, which allegedly occurred sometime after July 2014. *See* ECF No. 11 at ¶ 45. I therefore
7 dismiss Kraja’s complaint for failure to exhaust his administrative remedies with respect to all
8 claims except his hostile-work environment claim and his claim that defendants intentionally
9 failed him on a work-performance test because of his Albanian descent.

10 **B. National-Origin Discrimination**

11 To state a claim for race or national-origin discrimination, a plaintiff must plead that (1)
12 he belongs to a protected class, (2) he was qualified for his position, (3) he was subject to an
13 adverse employment action, and (4) similarly situated individuals outside his protected class were
14 treated more favorably. *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003) (citing *McDonnell*
15 *Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Defendants argue that Kraja failed to
16 plausibly allege a claim for race or national-origin discrimination. Having determined that the
17 only timely claim is Kraja’s allegation that defendants intentionally failed him on a work-
18 performance test, I limit my review to that claim. Defendants argue that this claim is implausible
19 because the complaint contains no facts showing that Kraja was discriminated against because he
20 is Albanian. I disagree.

21 Kraja alleges that he was the only Albanian server at the restaurant and that Rotolo
22 repeatedly used ethnic slurs, said “Albanians are lazy, conniving, and thieves,” and yelled “You
23 fucking Albanians!” Kraja further alleges that he was singled-out by Rotolo because of his
24 ethnicity, that he was shoved into a corner, and that Kraja repeatedly complained to management
25 about the mistreatment. In response to his complaints, Kraja alleges that he experienced
26 additional harassment, lost shifts, was denied a job transfer, was required to do other servers’ side
27 work, was demoted, and was given a failing grade on a work-performance test.

At this stage, these allegations provide a backdrop that plausibly shows that Kraja's managers failed him on the work-performance test because of his Albanian descent and because he complained about discriminatory conduct. Defendants argue that Kraja cannot use Rotolo's slurs to show that the subsequent adverse-employment actions occurred because of Kraja's Albanian descent. Defendants reason that the allegations against Rotolo were not administratively exhausted and are therefore barred. Although the factual allegations from 2011 through July 2015 may not be used as the basis for an independent claim for discrimination because they were not timely exhausted, they may be used as background information to support a timely claim for discrimination. *Morgan*, 536 U.S. at 113 (stating that a plaintiff may use "prior [discriminatory] acts as background evidence in support of a timely claim").

I am also unpersuaded by defendants' argument that Kraja's complaint fails to plausibly allege that other similarly situated coworkers were treated more favorably. Kraja alleges that he was the only Albanian server and that he was subjected to years of mistreatment because of his ethnicity and complaints to management. He also alleges that he was the only server at the restaurant to pass the written portion of the test but fail the performance portion of the test. ECF No. 11 at 47. Together, these allegations are sufficient to show that other servers were treated more favorably than Kraja, even if other workers were occasionally mistreated.³ I therefore deny the defendants' motion to dismiss with regard to Kraja's claim that defendants intentionally failed him on the work performance test because of his ethnicity.

C. Hostile-Work Environment

To state a hostile-work environment claim, Kraja must allege that "(1) [he] was subjected to verbal or physical conduct because of [his Albanian ethnicity], (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment." *Johnson v. Riverside Healthcare*

³ Defendants argue that Kraja pleaded himself out of court by stating in an exhibit that other servers were also subjected to a hostile-work environment. Even if other workers were subjected to a hostile-work environment, it does not follow that other servers were not treated more favorably.

1 Sys., LP, 534 F.3d 1116, 1122 (9th Cir. 2008) (citation omitted). In considering whether the
2 discriminatory conduct was “severe or pervasive,” I look to “all the circumstances, including the
3 ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or
4 humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an
5 employee’s work performance.’” *Id.* (citations omitted). Because hostile-work environment
6 claims involve repeated conduct that can occur over a series of years, I may consider acts that
7 occurred outside of the statutory-filing period for purposes of liability. *Morgan*, 536 U.S. at 115–
8 17.

9 Defendants argue that Kraja’s complaint does not plausibly show that he was subjected to
10 a hostile-work environment because of his ethnicity and that, even if it did, the allegations
11 regarding Rotolo’s racial slurs cannot be considered because they were not administratively
12 exhausted. As stated above, Kraja’s complaint plausibly alleges that he was subjected to years of
13 harassment that began in 2011 with Rotolo’s remarks that “Albanians are lazy, conniving, and
14 thieves.” Kraja reported Rotolo to management on multiple occasions and experienced additional
15 harassment in response, including being shoved into a corner by Rotolo. Under *Morgan*, it is of
16 no import that Kraja failed to administratively charge the allegations against Rotolo. Because
17 both Kraja’s charge and complaint allege that the hostile-work environment began in 2011 and
18 continued through 2015, I may consider the component parts of the hostile-work environment that
19 were not timely charged. *Morgan*, 536 U.S. at 115–17. I therefore deny the defendants’ motion to
20 dismiss with regard to Kraja’s hostile-work environment claim.

21 C. Intentional Infliction of Emotional Distress

22 To state a claim for intentional infliction of emotional distress, a plaintiff must allege “(1)
23 extreme and outrageous conduct with either the intention of, or reckless disregard for, causing
24 emotional distress, (2) the plaintiff’s having suffered severe or extreme emotional distress and (3)
25 actual or proximate causation.” *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev. 2000).

26 The defendants first argue that Kraja’s emotional distress claim must be dismissed
27 because Nevada’s antidiscrimination statute, § 613.330, preempts common law tort claims and
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1 provides the exclusive remedy for discrimination allegations. I have previously my disagreement
2 with this argument. *See Wilson v. Greater Las Vegas Ass'n of Realtors*, No. 2:14-cv-00362–
3 APG–NJK, 2015 WL 1014365, at *4 (D. Nev. Mar. 9, 2015) (citing *Burns v. Mayer*, 175 F. Supp.
4 2d 1259, 1267 (D. Nev. 2001)); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1094 (9th
5 Cir. 2011) (“Nevada courts will not construe a statute as eliminating a common law cause of
6 action unless the statute unambiguously requires that result.”) (citations omitted). The defendants
7 have not persuaded me to change my mind here.

8 Defendants next assert that a number of Kraja’s allegations supporting his emotional
9 distress claim are barred by Nevada’s two-year statute of limitation. I agree. Kraja commenced
10 this action in September 2015 and his claim for emotional distress includes allegations from 2011.
11 *See* ECF No. 11 at ¶¶ 14, 90. He responds that these allegations are timely because his emotional
12 distress claim is a continuing tort. I am unpersuaded.

13 Under the continuing-tort doctrine, a claim will not be barred by the statute of limitations
14 if the tort involves continuing wrongful conduct that is timely alleged. *Flowers v. Carville*, 310
15 F.3d 1118, 1126 (9th Cir. 2002) (citation omitted). But the doctrine does not apply to discrete
16 acts. *Id.*; *see also Lewis v. US W. Commc’ns, Inc.*, 67 F.3d 307 (9th Cir. 1995) (“Wrongful acts
17 which are separate and wholly dissimilar are separate causes of action and the statute of
18 limitations begins to run from the time of the commission of each wrongful act.”). The doctrine
19 applies only where there is “no single incident” that can “fairly or realistically be identified as the
20 cause of significant harm.” *Id.* (citation omitted).

21 The doctrine is inapplicable to Kraja’s claim because he alleges a series of discrete acts
22 that can fairly be identified as the cause of his harm. For instance, he alleges that Rotolo inflicted
23 emotional distress on him by using ethnic slurs in 2011 and verbally assaulting him in 2012. *See*
24 ECF No. 11 at ¶ 90. He also alleges that other waiters inflicted emotional distress by posting a
25 sign reading “FAT ANDY” in 2014. *Id.* And he alleges that different managers inflicted emotional
26 distress by refusing to address Rotolo’s racial slurs and preventing him from transferring to a
27 different restaurant. *Id.*

1 Because each of these acts is distinct and was committed by different people, any claim
 2 related to the acts accrued when each was committed. *See Flowers*, 310 F.3d at 1124. As a result,
 3 the only timely allegations are those that occurred after September 2013, when DeGrazia replaced
 4 Rotolo as one of the assistant general managers. *See* ECF No. 11 at ¶ 36. The defendants argue
 5 that these allegations do not support a plausible emotional distress claim because the allegations
 6 concern demotions, performance evaluations, and mere insults, which are not cognizable
 7 allegations. *See* ECF No. 17 at 17–18. I agree.

8 “Liability for emotional distress will not extend to ‘mere insults, indignities, threats,
 9 annoyances, petty oppressions, or other trivialities.’” *Candelore v. Clark Cty. Sanitation Dist.*,
 10 975 F.2d 588, 591 (9th Cir. 1992) (citations omitted). Additionally, a “simple pleading of
 11 personnel management activity is insufficient to support a claim of intentional infliction of
 12 emotional distress, even if improper motivation is alleged. Personnel management consists of
 13 such actions as hiring and firing, project assignments, promotion and demotions, performance
 14 evaluations and other similar acts.” *Welder v. Univ. of S. Nevada*, 833 F. Supp. 2d 1240, 1245 (D.
 15 Nev. 2011) (citations omitted).

16 When DeGrazia replaced Rotolo in the fall of 2013, the bulk of Kraja’s complaints
 17 concern Bellagio’s failure to address past acts of discrimination, DeGrazia’s write-ups of Kraja,
 18 and Kraja’s eventual demotion to the Banquets C list. As pled, these acts are not “outside all
 19 possible bounds of decency” or “utterly intolerable in a civilized community.” *Maduike v. Agency*
 20 *Rent–A–Car*, 953 P.2d 24, 26 (Nev. 1998). I therefore dismiss Kraja’s emotional distress claim
 21 with leave to amend.

22 **D. Intentional Interference with Prospective Economic Advantage**

23 To state a claim for intentional interference with prospective economic advantage, a
 24 plaintiff must plausibly allege (1) a prospective contractual relationship between the plaintiff and
 25 a third party, (2) the defendant knew of the prospective relationship, (3) intent to harm the
 26 plaintiff by preventing the relationship, (4) the absence of privilege or justification by the
 27 defendant, and (5) actual harm to the plaintiff as a result of the defendant’s conduct. *In re Amerco*
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1 *Derivative Litig.*, 252 P.3d 681, 702 (Nev. 2011) (quoting *Wichinsky v. Mosa*, 847 P.2d 727, 729–
2 30 (Nev. 1993)).

3 Kraja alleges that Rotolo tortiously interfered with his application to work at Caesars
4 because Kraja's application was rejected with a note that read, "After speaking with your
5 Manager Vincent (Rotolo) we won't be able to continue with your application." ECF No. 11 at
6 ¶ 28. Kraja alleges that Rotolo's actions "were wrongful" but concedes that he "has been unable
7 to discover exactly what" Rotolo told Caesars. *Id.* at ¶ 103. Because Kraja's complaint does not
8 plausibly allege that Rotolo intended to harm Kraja or was unjustified in not recommending Kraja
9 for the position, I dismiss this claim with leave to amend.

10 **III. CONCLUSION**

11 Accordingly, IT IS ORDERED that the defendants' **motion to dismiss (ECF No. 17)** is
12 **GRANTED in part and DENIED in part.** Andi Kraja's § 1981 claims are dismissed with
13 prejudice, leaving federal claims against Bellagio for hostile-work environment and national-
14 origin discrimination/retaliation in connection with the work-performance test.

15 IT IS FURTHER ORDERED that Kraja's intentional infliction of emotional distress claim
16 and intentional interference with prospective economic advantage claims are dismissed without
17 prejudice and with leave to amend.

18 IT IS FURTHER ORDERED that if Kraja elects to file an amended complaint, he must
19 file it within 21 days of this order. If Kraja does not file an amended complaint, then this action
20 will proceed on his claims against Bellagio for hostile-work environment and national-origin
21 discrimination/retaliation in connection with the work-performance test.

22 DATED this 25th day of July, 2016.



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24 ANDREW P. GORDON
25 UNITED STATES DISTRICT JUDGE
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